

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JERRY DEWAYNE LORD,
Plaintiff,
v.
CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

Case No.: 3:15-cv-00669-BEN (KSC)

ORDER:

**(1) ADOPTING REPORT AND
RECOMMENDATION [Docket No.
21];**

**(2) DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT [Docket No. 13];**

**(3) GRANTING DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT [Docket No. 18]**

I. INTRODUCTION

Plaintiff Jerry Dewayne Lord filed this action seeking judicial review of the Social Security Commissioner's denial of his application for disability insurance benefits. (Docket No. 1.) A briefing schedule was issued. (Docket Nos. 14, 16.) Plaintiff filed a Motion for Summary Judgment. (Docket No. 13.) Defendant filed a Cross-Motion for Summary Judgment and an Opposition to Plaintiff's Motion. (Docket No. 18.)

1 On July 28, 2016, Magistrate Judge Karen S. Crawford issued a thoughtful and
2 thorough Report and Recommendation recommending this Court deny Plaintiff's Motion
3 for Summary Judgment and grant Defendant's Cross-Motion for Summary Judgment.
4 (Docket No. 21.) Plaintiff filed timely objections to the Report and Recommendation.
5 (Docket No. 22.)

6 Where a timely objection to a report and recommendation has been filed, the
7 district court reviews *de novo* those portions of the report or specific proposed findings or
8 recommendations to which an objection was filed. 28 U.S.C. § 636(b)(1). After
9 reviewing the Report and Recommendation, Plaintiff's Objections, and the relevant
10 portions of the record, the Court **ADOPTS** the Report and Recommendation in full.

11 **II. BACKGROUND**

12 The procedural history of this matter and a summary of the administrative record
13 ("AR") has been laid out in the thorough Report and Recommendation issued by the
14 Magistrate Judge. As this history is well-known to the parties, this Court adopts the
15 Magistrate Judge's description of the administrative record and procedural history. A
16 short summary of relevant events is laid out below.

17 Plaintiff applied for Social Security Disability Insurance benefits on May 3, 2011,
18 claiming the onset of disability on March 30, 2006. (AR 178.) He applied for
19 Supplemental Security Income benefits on May 2, 2012 and stated his disability began on
20 January 1, 2009. (AR 185.) On May 14, 2013, after holding a hearing, the
21 Administrative Law Judge ("ALJ") concluded that Plaintiff was not disabled and his
22 applications were denied. (AR 32-47.) The Appeals Council denied review of the ALJ's
23 decision, and the ALJ's decision became final. (AR 1-3.)

24 Plaintiff sought judicial review of that decision. (Compl. [Docket No. 1].) The
25 basis for Plaintiff's Motion for Summary Judgment is that the ALJ provided insufficient
26 reasons for rejecting a portion of the opinion of John A. Pella, M.D., the testifying
27 medical expert, that Plaintiff's functional capacity decreased to sedentary in August
28 2011. (Mot. at 2; AR 62-63.) The Report and Recommendation concluded that the ALJ

1 did not inappropriately reject Dr. Pella's opinions, and that substantial evidence supports
 2 the ALJ's ultimate conclusion that Plaintiff does not qualify for disability or
 3 supplemental security income benefits because he retains the residual functional capacity
 4 to perform his past relevant light work.

5 **III. STANDARD OF REVIEW**

6 An applicant may seek judicial review of a final agency decision pursuant to 42
 7 U.S.C. §§ 405(g), 1383(c)(3). An ALJ's decision will be reversed by the reviewing court
 8 only if "it is based upon legal error or is not supported by substantial evidence." *Bayliss*
 9 *v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citation omitted). "Substantial
 10 evidence means more than a mere scintilla but less than a preponderance; it is such
 11 relevant evidence as a reasonable mind might accept as adequate to support a
 12 conclusion." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court must
 13 consider the record as a whole, weighing both the evidence that supports and detracts
 14 from the ALJ's conclusion. *See Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001);
 15 *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). "The
 16 ALJ is responsible for determining credibility, resolving conflicts in medical testimony,
 17 and for resolving ambiguities." *Andrews*, 53 F.3d at 1039. Where the evidence is
 18 susceptible to more than one rational interpretation, the ALJ's decision must be upheld.
 19 *Id* at 1039-40. Finally, the Court may not reverse an ALJ's decision on account of an
 20 error that is harmless. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

21 **IV. DISCUSSION**

22 Plaintiff's objections mimic the arguments in his Motion for Summary Judgment.
 23 He argues that the ALJ did not provide sufficient reasons for rejecting the portion of Dr.
 24 Pella's opinion that Plaintiff's functional capacity decreased from "light" to "sedentary"
 25 work as of August 2011 due to a lumbar radiculopathy. The ALJ's decision provides two
 26 reasons for rejecting Dr. Pella's opinion: "While the claimant does have radicular pain,
 27 he has never demonstrated motor or sensory abnormalities. As noted above, his admitted
 28 activities are greater than sedentary." (AR 45.) The Report and Recommendation found

1 that although the ALJ “could have provided better or more detailed reasons for rejecting a
2 portion of Dr. Pella’s opinion, his failure to do so is not fatal to his ultimate
3 determination” that plaintiff retained a residual functional capacity for light work because
4 that conclusion is supported by substantial evidence. (Report and Recommendation at
5 24.)

6 Plaintiff contends that even if the Report and Recommendation is correct that the
7 record contains substantial evidence to support the ALJ’s decision, “this Court still
8 should reverse in light of the ALJ’s legal error of having failed to articulate specific and
9 legitimate reasons for rejecting Dr. Pella’s opinions.” (Obj. at 5.) He argues that the
10 ALJ’s first articulated reason for rejecting Dr. Pella’s opinion is factually untrue because
11 Plaintiff did, indeed, demonstrate motor and sensory abnormalities. (*Id.* at 4.) He also
12 claims, without legal citation, that the ALJ’s second articulated reason is “legally
13 inadequate.” (*Id.*) Plaintiff believes that the Report and Recommendation’s discussion of
14 the substantial evidence supporting the ALJ’s decision is purely “academic” because the
15 decision must be reversed due to the ALJ’s alleged failure to “articulate specific and
16 legitimate reasons for rejecting Dr. Pella’s opinions.” (*Id.*) For the following reasons,
17 the Court disagrees.

18 As a preliminary matter, the ALJ did not need to articulate “specific and legitimate
19 reasons” to reject Dr. Pella’s opinions. The “specific and legitimate reasons” standard
20 applies when the ALJ rejects the opinions of *treating* and *examining physicians*. See
21 *Lester v. Chater*, 81 F.3d 821, 830, 831 n.8 (9th Cir. 1995). Dr. Pella is a *non-examining*
22 *physician*, whose opinion is entitled to the least weight and which cannot, by itself,
23 constitute substantial evidence that justifies the rejection of the opinion of a treating or
24 examining physician. *Id.* at 830-31 (explaining the hierarchy of medical opinions, with
25 treating physicians at the top, examining physicians in the middle, and non-examining
26 physicians at the bottom, whose opinions are afforded the least weight). To reject the
27 opinion of a non-examining physician in the residual functional capacity assessment, the
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1 ALJ need only “explain why the opinion was not adopted.” Social Security Ruling 96-
2 8p. The ALJ satisfied that standard.

3 Furthermore, Plaintiff’s specific objections to the ALJ’s articulated reasons for
4 rejecting the testimony do not persuade the Court that the ALJ’s ultimate conclusion
5 should be disturbed. Plaintiff first objects that the ALJ’s statement that Plaintiff never
6 demonstrated motor or sensory abnormalities is empirically untrue. (Obj. at 3.) The
7 medical records cited by Plaintiff, which only span a three-month period over the
8 multiple years at issue, show mild findings related to decreased motor strength and
9 sensation. The Court agrees with the Report and Recommendation’s conclusion that
10 these minor notations do not negate the ALJ’s ultimate conclusion. (Report and
11 Recommendation at 23.) Although Plaintiff takes issue with the ALJ’s use of the word
12 “never,” it is clear that the ALJ reviewed the entire record, including the noted medical
13 records, before finding that Plaintiff had not demonstrated motor or sensory
14 abnormalities. (AR 41-46.) However, even if the ALJ erred in describing the minor
15 limits to Plaintiff’s motor and sensory abilities, such error is harmless because, as
16 explained below, substantial evidence supports the ALJ’s ultimate conclusion. *Molina*,
17 674 F.3d at 1115 (holding that ALJ’s error is harmless where it is “inconsequential to the
18 ultimate nondisability determination”).

19 The Court similarly rejects Plaintiff’s objection regarding the ALJ’s finding that
20 Plaintiff’s admitted activities are greater than sedentary. Plaintiff believes that the Report
21 and Recommendation was correct in finding that Plaintiff’s “admitted daily activities are
22 not enough to constitute substantial evidence to support the ALJ’s residual functional
23 capacity assessment.” (Report and Recommendation at 23; *see also* Obj. at 4-5.)
24 However, “Plaintiff submits that, contrary to Judge Crawford’s analysis, this is
25 effectively the end as far as Dr. Pella’s opinion is concerned.” (Obj. at 5.) That is,
26 Plaintiff argues that the Report and Recommendation should *not* have considered and
27 analyzed the substantial evidence that supports the ALJ’s ultimate conclusion and,
28 instead, should have reversed the ALJ’s determination. (*Id.*) Plaintiff cites no legal

1 authority in support of this argument because there is none. Contrary to Plaintiff's
2 desired outcome, the district court *must* determine whether substantial evidence supports
3 the ALJ's ultimate conclusion. *See, e.g., Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th
4 Cir. 2001) ("We uphold the Commissioner's decision denying benefits if . . . there is
5 substantial evidence in the record as a whole to support the decision."). The Report and
6 Recommendation complied with this mandate and, as next discussed, the Court agrees
7 with its analysis.

8 As noted, the Court finds that the ALJ's conclusion that Plaintiff retained the
9 residual functional capacity to perform light work is supported by substantial evidence.
10 The ALJ's decision is based on medical notes and reports by Plaintiff's treating and
11 examining healthcare providers and on the credibility of Plaintiff's testimony. The
12 Report and Recommendation discusses this evidence in depth, and the Court agrees with
13 its analysis. The opinion of Dr. Pella, a non-examining physician, is entitled to less
14 weight than the opinions of Plaintiff's treating and examining physicians. *Lester*, 81 F.3d
15 at 830-31. "Faced with conflicting medical opinions as to how much Plaintiff was
16 limited as a result of his impairment, the ALJ accepted the opinion[s] of the [treating and]
17 examining physician[s] over the opinion of the non-examining physician and set forth his
18 reasons for doing so. [Consistent with the hierarchy of medical source opinions, t]his is
19 what ALJs are supposed to do." *Jones v. Astrue*, No. CV 09-4562-PJW, 2010 WL
20 2598197, at *2 (C.D. Cal. June 22, 2010).

21 Therefore, in sum, substantial evidence supports the ALJ's conclusion and it is free
22 from legal error. Plaintiff does not qualify for disability benefits because he retains the
23 residual functional capacity for light work and, thus, is capable of performing his past
24 relevant work.

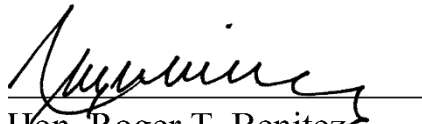
25 V. CONCLUSION

26 For the reasons discussed above, the Report and Recommendation is **ADOPTED**
27 in its entirety. (Docket No. 21.) Plaintiff's Motion for Summary Judgment is **DENIED**.
28 (Docket No. 13.) Defendant's Cross-Motion for Summary Judgment is **GRANTED**.

1 (Docket No. 18.) **IT IS THEREFORE ORDERED** that the final decision of the
2 Commissioner of Social Security is affirmed. The Clerk shall enter judgment
3 accordingly and shall terminate the case.

4 **IT IS SO ORDERED.**

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6 Dated: September 8, 2016

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8 Hon. Roger T. Benitez
9 United States District Judge
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